

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
TRENTON DIVISION**

TRANSCRIPT OF HEARING RE: OUTSTANDING DISCOVERY DISPUTES
IN MARCH 1, 2024 JOINT LETTER
BEFORE HONORABLE J. BRENDAN DAY
UNITED STATES MAGISTRATE JUDGE

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1 TRENTON, NEW JERSEY TUESDAY, JUNE 4, 2024 9:33 A.M.

2 (Call to order of the Court)

3 THE COURT: All right. We're here in the matter of
4 MacLean, et al., versus Wipro Limited, Docket Number 20-3414.

5 May I have the appearances of the counsel, starting
6 with plaintiff?

7 MR. KOTCHEN: Good morning, Your Honor. Daniel
8 Kotchen from Kotchen & Low on behalf of the plaintiffs, the
9 putative class. And with me is my colleague, Jonathan Rudnick.

10 THE COURT: Good morning, gentlemen. Mr. Kotchen, I
11 hope your back is doing all right.

12 MR. KOTCHEN: I appreciate your moving the hearing.
13 The back is not perfect, but it's very doable.

14 THE COURT: All right.

15 MR. KOTCHEN: It wasn't doable the last time.

16 THE COURT: Welcome to Trenton.

17 MR. KOTCHEN: Thank you.

18 THE COURT: And for the defendant?

19 MS. WILLIAMS: Good morning, Your Honor. Greta
20 Williams on behalf of Wipro Limited. And I am joined by my
21 colleagues, Alex Downie and Stephanie Silvano, who's our local
22 counsel in this case.

23 Also, I want to introduce the Court to Umung Varma,
24 who is Associate General Counsel at Wipro.

25 THE COURT: Good morning, Counsel. Mr. Varma, how

1 are you?

2 MR. VARMA: Doing well; thank you.

3 THE COURT: All right. We are here following a
4 telephone conference held on the record on March 18th, 2024,
5 continuing on a series of discovery disputes in this matter
6 that was set forth in a joint letter dated March 1st, 2024.
7 During the March 18th conference call, the Court resolved a
8 number of disputes set forth in that letter. And I figured
9 I'd just confirm with counsel before we move on to other
10 disputes that the disputes set forth in Paragraphs C and D in
11 the March 1st, 2024 letter related to the Phillips production
12 have been resolved. I assume that the transfer or the
13 reopening of the data that was the subject of those disputes is
14 either ongoing and the -- and review is underway. My
15 assumption is that there's nothing lingering that we need to
16 discuss today. Is that correct, Mr. Kotchen?

17 MR. KOTCHEN: I don't think there's anything to
18 discuss on those issues today, but --

19 THE COURT: All right. Ms. Williams?

20 MS. WILLIAMS: That's correct, Your Honor. We have
21 produced all of the Phillips documents to Mr. Kotchen; 63,000
22 documents and counting.

23 THE COURT: Okay, very good.

24 All right. Well, then let's start. I've reviewed
25 the letter, and I think the most efficient course would be go

1 issue-by-issue, starting with the dispute with respect to
2 backups, ESI preservation, destroyed ESI, and a proposed
3 30(b)(6) deposition regarding those issues.

4 I'll say at the outset, I have reviewed the letter,
5 I've given this quite a bit of thought, but I do want to have a
6 fulsome discussion from counsel to understand exactly where the
7 disputes lie. And there are certain -- as before, when we
8 talked on March 18th, I think there are certain areas where the
9 parties seem not to be too terribly far off, and then certain
10 areas where that's not the case. And so I may have quite a bit
11 -- quite a few questions from counsel.

12 But, Mr. Kotchen, let me start with you and
13 understand --

14 MR. KOTCHEN: Okay. Your --

15 THE COURT: -- plaintiffs' perspective.

16 MR. KOTCHEN: Sure. Sure, Your Honor. I mean, this
17 is a -- and would you like me to, I can --

18 THE COURT: Please. Yeah, start from the beginning,
19 if you would.

20 MR. KOTCHEN: Okay.

21 THE COURT: I've got all day.

22 MR. KOTCHEN: So, look, at the beginning of the case
23 -- and certainly the Local Rules contemplate -- contemplate
24 this. It's important to understand what sort of ESI issues
25 there may be, including backups, that the -- the

1 discoverability and the applicability of backups to a case.
2 That's particularly true in this case because of size
3 limitations that Wipro had for its employees and executives.

4 So if you go back to a prior system they referred to
5 as their Microsoft Exchange System, they had a -- an email size
6 limits of one gigabyte, which is very, very small. And once
7 employees and executives hit that limit, they couldn't send or
8 receive emails unless they deleted things or transferred them
9 to PSTs. And so the applicability of backups -- if emails
10 were deleted, and we think that they were pursuant to that, to
11 the size limitations, it's critically important to have -- to
12 have backups.

13 Now, according to Wipro, from 2016 to 2023, they
14 migrated employees and executives, although we don't know who
15 was migrated and when, to a new system that they referred to as
16 the Microsoft Office 365 System. That system had larger emails
17 -- box sizes. So for the primary email box, there's a hundred
18 gigabyte limitation. For an online archive of that, there's a
19 hundred gigabyte size limitation for employees that were below
20 C-1, and 1.5 terabyte --

21 THE COURT: Mr. Kotchen, can I just stop you? I just
22 want to make sure, just organizationally in the letter, the --
23 Paragraph A, the issue is broken down in sort of sub disputes.

24 MR. KOTCHEN: Correct.

25 THE COURT: And I just want to make sure I keep these

1 clear in my mind. Right now you're on backups, right? And
2 we'll go --

3 MR. KOTCHEN: I'm on backups now.

4 THE COURT: All right.

5 MR. KOTCHEN: Which is --

6 THE COURT: We're just going to -- we're talking
7 about that discrete subcategory, correct?

8 MR. KOTCHEN: That discrete issue, why it's
9 important.

10 So even their large -- so there was a new system that
11 folks were migrated to that ended -- the migration ended, as we
12 understand it, in 2023. There's still size limitations. It's
13 larger, but there's still size limitations, and still the issue
14 of backups is relevant.

15 So we need to understand on our side what backups
16 actually exist. And Local Rule 26.1(d) certainly requires
17 counsel to, both, familiarize themselves with the existence of
18 backups, and then discuss in the context with opposing counsel,
19 the need and discoverability of backups in this case.

20 We understand that there are -- we don't know what
21 backups exist with respect to the Microsoft Exchange of the
22 backups. We don't understand what backups exist with Microsoft
23 Office 365 backups.

24 We understand from counsel that backups could have
25 been created for SharePoint, OneDrive and Google -- or Google

1 Drives if there's a litigation hold, but we don't understand
2 what backups exist there.

3 So the first issue, and that we think is a critically
4 important issue considering the size limitations employees had
5 at Wipro, is what backups exist.

6 THE COURT: With respect to particular custodians,
7 particular repositories, particular data sets, is that the sort
8 of --

9 MR. KOTCHEN: Well --

10 THE COURT: -- level of granularity you want at this
11 point?

12 MR. KOTCHEN: We need -- yeah, who -- who has
13 backups? When were folks migrated? That is important because
14 there's going to be a time when we need to discuss with these
15 folks who the relevant custodians are for this case for ESI
16 discovery. And that question -- in order to really address
17 that question, we need to understand whose documents actually
18 exist and for what time period.

19 So for one custodian, if there's zero backups, and
20 that person deleted emails up until, we'll say 2023, that
21 person is going to be of less interest to us than somebody who
22 has backups that date back to the mid 2010s. And that's just -
23 - you know, it's an important threshold issue for us.

24 And one of the -- one of the -- on our side, one of
25 the frustrations that we've had is, notwithstanding the Local

1 Rule requirements about counsel familiarizing themselves with
2 backups, and then discussing it with opposing counsel, we don't
3 have a sense as to what backups actually exist.

4 THE COURT: Do you have a sense more generally in
5 your discussions with counsel that backups -- and you touched
6 on this a minute ago, I want to drill down a little bit more --
7 whether backups writ large may exist?

8 MR. KOTCHEN: We do not. We understand that if
9 there's a litigation hold -- as we understand from counsel,
10 there could be backups for SharePoint, OneDrive, and Google
11 drive.

12 With respect to the Microsoft Exchange backups, we
13 don't know what exists. With respect to Microsoft Office 365,
14 we've been informed those are -- those data centers are housed
15 primarily in Singapore, secondarily in Hong Kong.

16 But Wipro is a publicly traded corporation, an 11
17 billion dollar per year publicly traded corporation. If you
18 Google Microsoft Office 365, the first thing you see about
19 backups is they -- Microsoft recommends that backups be kept.
20 And we think that it would be -- we think that Wipro should
21 have backups, but we don't know for sure where they exist or
22 what they -- what backups do exist.

23 THE COURT: Would it -- I mean, would it satisfy you
24 to know, yes or no, say, you know, employees at Wipro who were
25 employed as of 2015, if there was a litigation hold, yes, there

1 are backups? If there was not a litigation hold, then, no,
2 there are no backups. And I ask that question because I'll
3 tell you one concern I have, and I'm happy to hear you, is I'm
4 not certain that Local Rule 26.1(d) contemplates the level of
5 granularity that you're seeking at this juncture. And if
6 you're asking Wipro to do some sort of an advanced
7 investigation as to which specific custodians' email accounts
8 have backups, which particular repositories there are back --
9 then it very much seems to me to be putting the cart before the
10 horse.

11 MR. KOTCHEN: That is -- it's a very fair point. I
12 mean, I -- you know, in fact, I hadn't thought about it that
13 way where we're asking them to figure out if it has backups, if
14 they have, you know, 15,000 U.S. employees, or how many of --
15 that's not what we're looking for. I think that's a very fair
16 point.

17 Our interest is there are going to be custodians who
18 are relevant, and that we're going to have to discuss with them
19 about the ESI discoverability of, and we need to understand
20 certainly as part of that discussion, what backups for those
21 individuals exist, or which ones don't have any backups. That
22 is -- that's -- I think it's a very good point, Judge.

23 THE COURT: All right. So then, again, I mean, I can
24 understand more generally, right? What exactly is the ask
25 here, right? Do backups exist? Do they not? Is that sort of

1 the level of information you're looking --

2 MR. KOTCHEN: The ask is, you know, generally do
3 backups exist for Microsoft Exchange? Do backups exist for
4 Microsoft Office 365? If SharePoint and the other share drives
5 have backups, generally what exist and for what time period?

6 THE COURT: Okay.

7 MR. KOTCHEN: That's high level, what we're looking
8 for.

9 THE COURT: Okay.

10 MR. KOTCHEN: I think that your point, which is a
11 good one, is once you drill down to the individual custodians,
12 those are certainly -- I mean, those, it's really relevant as
13 we discuss with Wipro who the custodians are in this case that
14 should -- should be --

15 THE COURT: Right. Just -- it seems to me that based
16 on the Phillips production, and based on good faith efforts
17 between counsel, you can identify a set of potential
18 custodians, and then figure out from there whether their data
19 is still there.

20 MR. KOTCHEN: I think --

21 THE COURT: Right?

22 MR. KOTCHEN: I think that that's -- is a very fair
23 point.

24 THE COURT: Yeah, okay.

25 MR. KOTCHEN: Yeah.

1 THE COURT: All right. Thank you, Mr. Kotchen.

2 Let me hear from you, Ms. Williams, on the backup
3 issue.

4 MS. WILLIAMS: Okay. Thank you, Your Honor.

5 Just to -- can I -- can I just make a few preliminary
6 points --

7 THE COURT: Absolutely.

8 MS. WILLIAMS: -- before I move to the --

9 THE COURT: Sure.

10 MS. WILLIAMS: -- to the -- our favorite backup --
11 backups issue, and servers, and on-premises software?

12 THE COURT: Sure.

13 MS. WILLIAMS: I just want to -- I just want to --
14 before we just get into the weeds of that, we've been engaging
15 in document production for nine months now. As you know, this
16 is not the first time we've been before Your Honor. Plaintiff
17 has moved to compel on six categories of issues, which adds up
18 to about 16 discrete issues. Your Honor has resolved two of
19 them, and I think generally -- and has agreed with our client's
20 position that much of the documents and discovery that Mr.
21 Kotchen has been seeking goes beyond the needs of the case.
22 And you did not force us to compel the detailed staffing data
23 last time, you did not force us to turn over age and gender
24 data that has nothing to do with the issues in the case, and we
25 are deeply appreciative of the time you've spent looking into

1 this, all the lengthy issues spelled out in our joint letter.
2 And we appreciate the balanced approach you've taken here, and
3 being mindful of the, you know, what's proportional to the
4 needs of the case.

5 And so -- but since the last conference, plaintiffs
6 have not backed away from any of their positions here. We did
7 meet and confer, as Your Honor directed us to do, but they have
8 not moved away from any of the positions, and we haven't been
9 able to narrow those issues.

10 I think one thing that concerns us in particular
11 about the discovery excesses here is the fact that this is
12 copycat litigation, right? And it's really the same case as
13 Phillips. And pursuant to the Court's order, as I mentioned,
14 we have now produced all of the documents from the Phillips
15 case. We've reproduced them in this litigation, right? So
16 that's nearly 65,000 documents. That's in addition to and over
17 400,000 pages, right? That's in addition to the over 7,000
18 pages of documents and, you know, hundreds of documents we have
19 already produced in this litigation.

20 This is not a case where we're just trying to slow
21 roll or delaying our production obligations. We want to get to
22 the merits of this case. And we're concerned that these issues
23 like backups, to use your words, are putting the cart before
24 the horse and really just creating a sideshow; I will get to
25 the backups in a minute.

1 It's worth noting too, Your Honor, that we've tried
2 time and again through meet and confers, through extensive
3 correspondence back and forth with the other side to resolve
4 these, but to no avail. So we're back here today and we're
5 hoping that we can get past these discovery disputes, and to
6 rein in some of the excessive requests we're seeking, and
7 proceed with discovery and litigating the merits.

8 On the backups, I think you're exactly right. As I
9 said, the plaintiffs are putting the cart before the horse.
10 They've asked for extensive, extensive information about our
11 backups practices. We've provided responses in writing for
12 different emails and letters back and forth.

13 You asked if they're seeking information about
14 particular custodians or particular individuals as opposed to
15 just all of our practices in general and what backups exist out
16 there in the world. We have provided some of that, but as you
17 said, Your Honor, I think this -- what they're seeking here
18 goes far beyond what Rule -- Local Rule 27.1(d) [sic]
19 contemplates.

20 And, in fact, we have already provided more than what
21 the Local Rule calls for. We have provided a full list of the
22 custodians who received the litigation hold in the Phillips
23 case and in this case. If there are particular questions about
24 what backups exist for those individuals, we could address
25 that. But what they're seeking here goes well beyond that. We

1 have already expended significant resources trying to
2 understand and get our arms around all of the various backup
3 practices at the company --

4 THE COURT: Well, let me ask you -- I mean, Ms.
5 Williams, I appreciate the background. Specifically, right --
6 and I don't know if this is the right way to think about it,
7 but Mr. Kotchen sort of outlines two separate buckets, right?
8 You have potential custodians' own email accounts, and whether
9 there are backups for individual email accounts, or whether
10 those accounts were saved as PST files, and that's sort of a
11 sort of hit or miss, I think. It's fair to say that, you know,
12 it depends on whether a particular employee saved his or her
13 email accounts to a PST file or not. So that's one bucket.

14 And then sort of more central or particular, I mean,
15 maybe it's -- it can be individualized to employees, but
16 SharePoint, and OneDrive, and Google Drive type data sets. And
17 I understood Mr. Kotchen's understanding to be that Wipro would
18 have backups of those data sets to the extent that there was a
19 litigation hold, is that accurate?

20 MS. WILLIAMS: Yes, that's correct, Your Honor.

21 THE COURT: Okay.

22 MS. WILLIAMS: They would have backups of those
23 SharePoint sites and OneDrive, to the extent that there was a
24 litigation hold in place.

25 THE COURT: For that particular custodian.

1 MS. WILLIAMS: I'm sorry?

2 THE COURT: Sent to that particular custodian.

3 MS. WILLIAMS: Correct. Correct, but not otherwise.

4 THE COURT: Okay. Okay. Does the same go for
5 custodians' individual email accounts, whether on the old
6 Microsoft Office -- what was it, Exchange? Is that what it was
7 called?

8 MS. WILLIAMS: It was the on-premises software.

9 THE COURT: Okay. And/or the Office 365 that was the
10 newer system.

11 MS. WILLIAMS: Right. So starting in 2016, employees
12 started getting migrated over to the M365, right? And so the
13 emails are stored at two data centers, as Mr. Kotchen alluded
14 to, in Hong Kong and Singapore, right? So there's a service
15 interruption at one, then information can be pulled from the
16 other and -- so Wipro's services are not impacted.

17 We have not revealed in our investigation to date,
18 which has been quite extensive as I mentioned, we haven't
19 revealed any other backups or disaster recovery systems with
20 respect to emails other than those -- the ones that we've
21 discussed. And as I said, we don't -- that Wipro does not
22 maintain backups of the SharePoint, OneDrive, and Google Drive
23 absent a litigation hold.

24 THE COURT: Yeah, but go back to the emails. What
25 did you just say? You've not discovered whether there's?

1 MS. WILLIAMS: Right. We haven't discovered -- aside
2 from these data centers in Hong Kong and Singapore, we're not
3 aware of other backup --

4 THE COURT: I see.

5 MS. WILLIAMS: -- systems but --

6 THE COURT: I see.

7 MS. WILLIAMS: Right? But there's certain storage --
8 storage limits. You know, Mr. Kotchen has noted that the one
9 gigabyte storage limit and how that's very small, that
10 limitation was only in place until 2016. And that's when
11 everybody began being migrated, and now -- this is all set
12 forth in detail in our papers, but it's up to, like, 100
13 gigabytes. So it's much -- it's much, much larger. And so,
14 you know, it seems like the number of people who would be
15 reaching that limitation is very, very small. And, again, just
16 not a real issue here. This just seems like a sideshow and
17 we're putting the cart before the horse.

18 THE COURT: So, I mean, it's -- I think it's -- it's
19 helpful for my mind, at least, to think about this in more real
20 -- real sort of on-the-ground terms. You have -- as an
21 example, an employee A who was employed by Wipro in 2015,
22 right, and there was a one gigabyte email limitation, right,
23 that employee left, say, in 2018, for whatever reason, right?
24 Say hypothetically that the parties agree that this person is a
25 relevant custodian who may -- whose emails may contain

1 discoverable information. What is Wipro's general position as
2 to whether that person's email account will be accessible via
3 one of these two data centers?

4 MS. WILLIAMS: If that person was on a litigation
5 hold, or no?

6 THE COURT: No.

7 MS. WILLIAMS: If they're not on a litigation hold, I
8 mean, I think that you would have to do more digging around and
9 more inquiry.

10 THE COURT: With respect to that particular
11 custodian.

12 MS. WILLIAMS: With respect to that particular
13 custodian, if he was not on a lit hold and this was back in
14 2016. I mean, I think we would want to do a little bit more
15 digging on the circumstances of that particular employee to
16 better understand that, right? We can't speak to every single
17 employee and the individual circumstances. You know, certainly
18 that -- certainly the typical practice was for their emails to
19 be preserved until the time that their employment ended, and
20 then some -- and then, you know, it would -- there was no auto
21 deletion in place. But depending on the size of the email box,
22 their emails may have, you know, may have been deleted at some
23 point.

24 THE COURT: I guess what I'm saying, I do have the
25 concern that I expressed to Mr. Kotchen, but it does seem that

1 there's a more concrete answer out there with respect to these
2 two data centers where you could say, right, for employees who
3 were not subject to a litigation hold, as a general matter, the
4 data centers have backups or they don't. With the caveat,
5 right, that, you know, when we get down into the nitty-gritty
6 and select individual custodians, all of this could change when
7 we do the investigation as to those particular -- you know what
8 I'm saying? I mean, it seems to me that there's something more
9 you can provide, but that still, you know, accommodates for my
10 -- what I believe is a well-grounded concern, that you're not
11 doing a full-blown investigation, right, before you even get
12 into data production.

13 MS. WILLIAMS: Right. Your Honor, what -- I
14 appreciate -- appreciate, you know, your thinking here.

15 THE COURT: Yeah.

16 MS. WILLIAMS: And -- but what I would suggest is
17 we've already, in terms of who are the relevant custodians,
18 they have all the Phillips documents. They have everybody who
19 was sent a litigation hold in the Phillips case. They have
20 everybody who was sent a litigation hold in this case. We
21 haven't heard a peep about that, or taken -- they haven't
22 raised any questions about those people --

23 THE COURT: We're going to get to that at the end of
24 this. I mean, because I do think at the end of, right, today,
25 and we are -- to your point, we are going to put all of these

1 issues behind us one way or another and get into actual
2 discovery. But if there is an answer, right -- hypothetically,
3 if the data centers have no backups, period, for any employees
4 who are not subject to a litigation hold, then they know that,
5 right? Then you don't even have to go to the trouble of doing
6 these individualized investigations, right? And if there's not
7 sort of a one size fits all answer, then you can say that,
8 right?

9 And so what I'm trying to find, is there -- is there
10 a middle ground, particularly with respect to emails and these
11 data centers? I think, you know, it seems to me that you've
12 satisfied me with the litigation hold, and the SharePoint, and
13 OneDrive, and Google Drive bucket.

14 But I'm trying to avoid everybody spinning their
15 wheels if there's a more general answer that these employees,
16 if they were not subject to a litigation hold, their emails are
17 not likely to be there. Does that make sense?

18 MS. WILLIAMS: Yes, that makes sense. I think if
19 there are particular individuals that they are concerned about,
20 above and beyond the people on the litigation hold, well, then
21 they could let us know about that, presumably. Or if there are
22 questions about specifically what data is out there for the
23 people on the list of litigation hold recipients, perhaps
24 that's a middle ground approach to think about here.

25 I just raised the fact that we provided this

1 information because we do have in play, Your Honor, the
2 universe of relevant people and custodians here. So doing a
3 broader investigation in -- you know, it just doesn't seem
4 necessary.

5 THE COURT: Yeah, I just --

6 MS. WILLIAMS: But I appreciate your point about, you
7 know, if there's a simpler, you know, easier answer.

8 THE COURT: Have you gotten into with the plaintiffs
9 yet any specific discussion about potential custodians to be
10 searched here beyond the ESI that's been produced in Phillips?

11 MS. WILLIAMS: We have not, Your Honor.

12 THE COURT: Okay; all right. Thank you, Ms.
13 Williams.

14 Mr. Kotchen, here's -- on the backups issue. What
15 I'm inclined to do is direct the parties to engage in
16 negotiating individual custodians with respect to their emails.
17 Unless you tell me otherwise, I understand there to be a pretty
18 firm answer on the SharePoint, OneDrive, and Google Drive data,
19 that if it was subject to a litigation hold, then, yes. If
20 not, then, no.

21 At the same time, direct Wipro to begin this general
22 investigation, right? If they can tell you, no, there's no
23 data at these data centers for any custodians if they weren't
24 subject to a litigation hold, then you have your answer. But
25 at the same time, it seems to me you're probably ultimately

1 going to get into these individual sub investigations --

2 MR. KOTCHEN: Fair enough.

3 THE COURT: -- once you agree on a custodian set.

4 MR. KOTCHEN: Fair enough. I mean, that is -- I
5 think that that is -- I mean, the discussion that you folks
6 just had is exactly the discussion that we -- the answers that
7 we were hoping for. But we could certainly -- can -- can defer
8 that and get into the individual custodian-specific folks.

9 THE COURT: Yeah, I just -- I think you're going to
10 end up there anyway.

11 MR. KOTCHEN: I think so, too.

12 THE COURT: And so you might as well start.

13 MR. KOTCHEN: I think so, too. And, I mean, look,
14 that is -- so we're happy to do that. We'll certainly meet and
15 confer for -- on those. You know, they're -- in this Section
16 A --

17 THE COURT: Yeah.

18 MR. KOTCHEN: -- of our joint letter, there's also
19 kind of what lost PSI is there for the Phillips collection
20 effort.

21 THE COURT: I was going there next. Yeah, so --

22 MR. KOTCHEN: I mean, I think it seems like those
23 discussions can be had again on an individual custodian level
24 basis.

25 THE COURT: You read my mind.

1 MR. KOTCHEN: Okay.

2 THE COURT: I can't -- I mean, I feel even more
3 strongly on that subcategory than I do the first --

4 MR. KOTCHEN: I -- right.

5 THE COURT: -- because asking Wipro to identify what
6 data has been lost without tying it to particular, you know,
7 repositories or custodians is a task that I'm not going to
8 impose.

9 MR. KOTCHEN: That makes -- that makes sense. And I
10 would even say that the -- they have provided, which we
11 appreciate, what was collected in Phillips, and search terms.

12 THE COURT: Right.

13 MR. KOTCHEN: But we -- you know, I think there are -
14 - there are a number of questions that we have about that that
15 perhaps we can take up with them, or if Your Honor wanted to
16 discuss that now, we'd be happy to do it.

17 THE COURT: No, I mean, I understood on the -- on
18 the, quote, "gaps" in the Phillips production, my understanding
19 was that there was -- Wipro had said, if you have any
20 questions, let us know. And you just never came to ground on
21 that --

22 MR. KOTCHEN: Right.

23 THE COURT: -- further discussion, is that a fair --

24 MR. KOTCHEN: I think that's -- that's a fair
25 characterization.

1 THE COURT: Okay.

2 MR. KOTCHEN: Yes, Your Honor.

3 THE COURT: All right.

4 MR. KOTCHEN: And so we have -- we do have a number
5 of questions about, you know, search terms were run against 14
6 individuals' documents. We don't know which documents, and we
7 really don't know --

8 THE COURT: Yeah.

9 MR. KOTCHEN: -- you know, when we're talking about
10 emails, we're talking about other things, what exactly was
11 searched.

12 THE COURT: I mean, look, that might help you ground
13 the discussion on --

14 MR. KOTCHEN: Yes.

15 THE COURT: -- what backups exist in the first place,
16 right?

17 MR. KOTCHEN: Yes.

18 THE COURT: And so I think that that sort of organic
19 discussion will cover all of these --

20 MR. KOTCHEN: I think so, too.

21 THE COURT: -- all of these subcategories.

22 MR. KOTCHEN: I think --

23 THE COURT: Right?

24 MR. KOTCHEN: I think that's exactly right.

25 THE COURT: All right.

1 MR. KOTCHEN: We're happy to do that.

2 THE COURT: Okay. Is everybody on the same page of
3 what we're doing then with Subcategory A?

4 MS. WILLIAMS: Yes, Your Honor.

5 THE COURT: We're going to get into individual
6 discussions about proposed custodians, meet and confers,
7 discussing questions about gaps --

8 MR. KOTCHEN: Right.

9 THE COURT: -- or, you know, supplemental information
10 with the Phillips data collection.

11 And I think with respect to lost or destroyed ESI,
12 you know, to the extent general universal answers come out of
13 those discussions, fine.

14 MR. KOTCHEN: Right.

15 THE COURT: But it very much seems to me that you're
16 going to be having all of these questions on a custodian-by-
17 custodian, repository-by-repository basis.

18 MR. KOTCHEN: I think that's a good approach, Your
19 Honor.

20 THE COURT: Okay; all right.

21 MR. KOTCHEN: Thank you.

22 THE COURT: Which sort of segues me into the
23 30(b)(6).

24 MR. KOTCHEN: Correct.

25 MS. WILLIAMS: Can I --

1 THE COURT: No.

2 MR. KOTCHEN: Yeah, we'll defer.

3 THE COURT: No.

4 MR. KOTCHEN: I -- I -- in preparing for this, I knew
5 that's what you would do.

6 (Laughter)

7 THE COURT: All right.

8 MR. KOTCHEN: All right.

9 THE COURT: Very good.

10 MR. KOTCHEN: Okay.

11 THE COURT: Let's -- I think that takes care of A.

12 MR. KOTCHEN: Good.

13 THE COURT: All right; okay. Category B. Let me
14 outline -- so this section covers four different document
15 requests. And I want to make sure I understand the --
16 understand the exact issue that's in dispute.

17 MR. KOTCHEN: Okay.

18 THE COURT: If I understand it correctly, the only
19 outstanding issue with respect to all four of those requests
20 concerns the visa-related practices and data, is that -- is
21 that accurate?

22 MR. KOTCHEN: I think that's accurate. The visa --

23 THE COURT: Ms. Williams, has Wipro agreed to produce
24 documents within those requests, to the extent that they cover
25 other issues that aren't related to visas or visa practices?

1 MS. WILLIAMS: Yes, we have, Your Honor.

2 THE COURT: Okay; all right. So it's only -- it's
3 the visa aspect of each of those requests.

4 MS. WILLIAMS: That's right, Your Honor.

5 MR. KOTCHEN: Correct.

6 THE COURT: Okay; all right.

7 MR. KOTCHEN: Correct. I think that -- I think
8 that's right, but maybe -- perhaps --

9 THE COURT: We'll see if something comes out of --

10 MR. KOTCHEN: -- (indiscernible - not at microphone)
11 complaints, I'm not sure.

12 MS. WILLIAMS: Oh, yes. Sorry.

13 MR. KOTCHEN: Yeah.

14 MS. WILLIAMS: There's -- separate --

15 MR. KOTCHEN: Yes.

16 MS. WILLIAMS: -- there's the visa issues. There's
17 RFPs that deal with visa-related practices, and then there's
18 RFPs that deal with complaints about --

19 THE COURT: Right.

20 MS. WILLIAMS: -- other types of discrimination.

21 THE COURT: Right, okay. Fair enough.

22 MS. WILLIAMS: So there's sort of two sub buckets.

23 THE COURT: All right, that's right. That's right.

24 MR. KOTCHEN: But the visa issue is a commonality
25 (indiscernible - not at microphone)

1 THE COURT: Got it.

2 MR. KOTCHEN: And, look, I'll start with -- if you
3 want me to address it.

4 THE COURT: Please.

5 MR. KOTCHEN: Okay. Let's first talk about visa
6 policies, procedures, mandate, directives, you know, reports
7 and so forth, which I think are Request Number 8 and 16, that
8 are separate from an investigation or complaints.

9 If you look at our complaint, and if you look at, you
10 know, Paragraphs 18 to 20, 23, if you look at the motion to
11 dismiss that Wipro filed with respect to disparate treatment
12 and disparate impact, and their arguments that our focus on
13 Wipro's visa policies and procedures sounded in intentional
14 discrimination such that disparate impact not be at issue in
15 this case. And then if you look at the motion to dismiss order
16 -- Judge Cantor's [sic] motion to dismiss order, she also
17 focused on visa-related issues at a number of different points
18 in her motion to dismiss order.

19 And in the briefing, in the -- in our joint discovery
20 letter, I mean, Wipro devotes one sentence to this issue saying
21 they shouldn't have to produce policies, procedures and so
22 forth relating to visas. But that is exactly -- their use of
23 the visa system is exactly how they effect their discriminatory
24 objectives. And so --

25 THE COURT: You agree there's not a visa

1 discrimination claim in the complaint.

2 MR. KOTCHEN: There's not a visa discrimination
3 claim. But their visa employees are either all or almost
4 entirely of Indian -- Indian nationals or South Asian descent.
5 And so when there is a use of the term saying let's -- let's
6 create a visa-ready workforce, let's focus on visa utilization,
7 that is what they're saying, in effect. Their practice is
8 let's put the Indian -- let's give Indian nationals who require
9 visas first priority when it comes to staffing.

10 And so it's impossible to separate out our visa
11 allegations from the intentional discrimination. And that's
12 exactly what Wipro argued in their motion to dismiss, and Judge
13 Cantor [sic] agreed with them.

14 THE COURT: I think it was Judge Wolfson at the time.

15 MR. KOTCHEN: Judge Wolfson, yeah, that's exactly
16 right. Agreed that that is -- that's exactly what happened
17 here.

18 THE COURT: So hypothetically, if Wipro had a policy
19 of directing 100 percent of its energies, resources, and focus
20 on securing H-1B visas for Indians to the exclusion of all
21 other nationalities, that is relevant in your mind to
22 intentional race discrimination.

23 MR. KOTCHEN: That's exactly right, it's absolutely
24 intentional. And the data will show that -- will show that
25 their visa employees, or H-1B employees are either a hundred

1 percent or over 99 percent from -- folks from India.

2 And so that is why when you have a policy in place,
3 for example, saying "prioritize visa employees," that is a
4 policy that means prioritize folks of Indian national origin
5 and South Asian descent.

6 And so when you look at our complaint, you look at
7 their motion to dismiss, you look at the motion to dismiss
8 order, that this is an issue of critical importance to the
9 case. And if we're deprived of the policies, procedures, plans
10 and so forth pertaining to visa employees, we're deprived of
11 discovery that we need to prove what Wipro has held us to here,
12 which is intentional discrimination, if we're complaining about
13 their visa policies and programs.

14 THE COURT: Can I ask you a question specifically
15 with respect to RFP 16?

16 MR. KOTCHEN: Sure.

17 THE COURT: And in the prior conference call, we had
18 a very fulsome discussion on the monthly or the quarterly
19 reports with respect to staffing, etc.

20 MR. KOTCHEN: Correct.

21 THE COURT: And the visas are lumped into that. Do
22 you know or suspect there to be reports of the kind that we
23 were talking about before that pertain in some way to visas? I
24 guess a different way of asking that is, what sort of reports
25 are you envisioning pertain to visas?

1 MR. KOTCHEN: There will be utilization reports. So,
2 for example, they will -- Wipro will track utilization of visa
3 employees. And so if there are visa-ready employees that
4 haven't been deployed yet in the U.S. who reside in India,
5 there will be reports that direct folks, "here's the
6 utilization," "here's who's available," "here's who needs to be
7 staffed," "here's who needs to be allocated to these business
8 units," and so forth. That type of report -- those types of
9 plans will definitely exist.

10 THE COURT: I'm sorry, I'm not quite following. I
11 mean, if the theory, though, is that all or almost all of their
12 visa recipients are Indian or South Asian nationality, then
13 what are the utilization reports going to show or assist with,
14 you know, visa-related discrimination?

15 MR. KOTCHEN: They -- the utilization reports will
16 show we have a thousand visa-ready employees, and they need to
17 be staffed ASAP --

18 THE COURT: Right.

19 MR. KOTCHEN: -- in the U.S. Here's where they can
20 go, here's where they can be placed. They will track
21 utilization, they will map employees to specific positions. At
22 the same time that they're doing that, folks who are in the --
23 non-Indians in the U.S. working will be taken out of positions,
24 put in the non-productive status --

25 THE COURT: Oh, I see.

1 MR. KOTCHEN: -- referred to as being benched, and
2 those folks will come in and take the jobs.

3 THE COURT: And do the reports that we discussed
4 before that Wipro has either agreed or been ordered to produce
5 not already contain data points or evident data as to whether
6 particular employees were visa workers?

7 MR. KOTCHEN: I mean, my understanding is that Wipro
8 -- if there is a utilization that folks on -- here's
9 utilization -- hypothetically speaking, a report, utilization
10 of our visa employees, that that is something that they're not
11 -- they're not going to produce because it relates to visa
12 employees. And that is the type -- specifically the type of
13 report, plan, whatever you want to refer to it, that we need --
14 we need to -- in discovery to prove our claims and to certify a
15 class, by the way.

16 THE COURT: Oh, I guess I hadn't understood that. Is
17 -- your understanding of Wipro's position is that if an
18 employee is a visa worker, they're not providing any
19 information as to that employee?

20 MR. KOTCHEN: They're not -- they're not providing
21 discovery on visa workers for -- I mean, in theory, I guess
22 that they could be providing -- if a visa worker -- if there's
23 a document that talks about staffing generally, and it includes
24 visa workers, perhaps --

25 THE COURT: Well, but in the monthly or quarterly

1 snapshots that you're receiving, those don't include employees
2 or former employees?

3 MR. KOTCHEN: Oh, no, they -- I think the snapshots
4 would include visa employees.

5 THE COURT: Okay; all right.

6 MR. KOTCHEN: But, yeah --

7 THE COURT: All right. That was my --

8 MR. KOTCHEN: But --

9 THE COURT: They're -- they're not refusing to
10 produce information as to employees who are visa workers.
11 They're refusing to provide data with respect to visas.

12 MR. KOTCHEN: They're -- they're refusing to -- if
13 there are business plans, if there are reports responsive to
14 Request Number 8 and 16 --

15 THE COURT: And I'm going to -- look, I'm going to
16 silo those off, and we'll -- we'll --

17 MR. KOTCHEN: Okay.

18 THE COURT: I'll hear from Ms. Williams.

19 MR. KOTCHEN: My understanding is if they involve
20 visa issues, they're not producing them.

21 THE COURT: Okay; all right.

22 MR. KOTCHEN: That --

23 THE COURT: Thank you, Mr. Kotchen.

24 MR. KOTCHEN: That's my understanding. And if they
25 are withholding from us the policies, procedures, directives

1 pertaining to visa employees, that is -- what they're doing is
2 preventing us from both certifying a class, because that's
3 critical to class certification, and proving our
4 discrimination --

5 THE COURT: Well, let me ask you this, just to make
6 sure that I understand the lay of the land correctly. What
7 percentage of Indian employees are visa workers as opposed to -
8 - I mean, they -- they must all be visa workers, to the extent
9 they're working in the United States, is that correct, or am I
10 mistaken?

11 MR. KOTCHEN: Well, what percentage of -- in the
12 U.S., it has changed over time as it -- there's been kind of
13 legislative pressure, you know, public pressure. So, if you
14 look at the -- at the bands where -- like, these are -- these
15 are the critical jobs. They're not the lowest level, they're
16 the mid -- the mid-tier jobs. They're largely, predominantly
17 visa employees. And, again, by definition, they're largely or
18 predominantly employees of Indian national origin, South Asian
19 descent.

20 And so when you look at the critical bands over time,
21 that is -- that's what you'll see.

22 THE COURT: Yeah. I'll hear from Ms. Williams. I
23 think it would be surprising if they say that they're -- well,
24 let me hear what --

25 MR. KOTCHEN: Okay.

1 THE COURT: -- what Ms. Williams has to say.

2 MR. KOTCHEN: Okay; fair enough.

3 THE COURT: Answer just that question first. To the
4 extent that you've already been producing monthly or quarterly
5 snapshots with respect to employees, right? You're not
6 excising employees who happen to be visa workers.

7 MS. WILLIAMS: No, Your Honor.

8 THE COURT: You're just not producing the data as to
9 the visa, is that correct?

10 MS. WILLIAMS: Well, actually, Your Honor, so -- so -
11 - right, we are not excluding employees --

12 THE COURT: Got it.

13 MS. WILLIAMS: -- who happen to have visas from --
14 from information but --

15 THE COURT: It would have been surprising had you
16 said that, okay.

17 MS. WILLIAMS: That sounds like a whole other
18 headache. But -- and I just want to be clear about what we are
19 producing with respect to visas.

20 THE COURT: Yeah.

21 MS. WILLIAMS: So -- and to be very clear, our
22 position is that this -- this -- the information related to
23 visa policies and practices is not relevant, because as you
24 noted, there is no visa discrimination case -- claim in this
25 case. And cases in the Third Circuit have not permitted

1 discovery into other types of discrimination. Those cases are
2 cited in our papers at Page 17.

3 We have agreed, though -- and this is with respect to
4 the data, right? We have agreed to pull and produce updated
5 visa data containing the same fields in the same format that
6 such data was produced in Phillips, right? This was -- partly
7 goes to our discussion at the last conference. But those
8 fields do contain information about each employee's visa type,
9 status, and the date.

10 So even though our position is that this information
11 is not relevant, plaintiffs will be receiving this data in this
12 case, and updated data from the Phillips time period to the
13 present.

14 THE COURT: And what data points are those? Say that
15 again, whether they were --

16 MS. WILLIAMS: It's the --

17 THE COURT: -- whether they were --

18 MS. WILLIAMS: It's the --

19 THE COURT: -- visa recipients.

20 MS. WILLIAMS: Yeah.

21 THE COURT: The type of visa --

22 MS. WILLIAMS: Each employee's visa type, the status,
23 and the dates of the visa.

24 THE COURT: Mr. Kotchen, is that the sort of
25 information you're looking for in these reports?

1 MR. KOTCHEN: Judge, we are looking for -- there will
2 be -- it's different. We're looking for policies --

3 THE COURT: No, no, no. With respect to -- with
4 respect to the RFP 16.

5 MR. KOTCHEN: Okay.

6 THE COURT: To the extent that you're requesting
7 reports with respect to visas, on the monthly or quarterly
8 snapshots, Ms. Williams is saying, you're going to get a data
9 field that says this employee was a visa recipient, was an H-1B
10 visa recipient, etc.

11 MR. KOTCHEN: No, that request would have been
12 covered by staffing. Staff -- a staffing request that
13 specifically calls for data.

14 Request number 16 asked for plans or reports
15 concerning a number of issues, including visas. And so what
16 you'll see is you will see things like utilization. We are
17 tracking utilization. Utilization has increased from 60
18 percent --

19 THE COURT: I see.

20 MR. KOTCHEN: -- to 80 percent.

21 THE COURT: I see.

22 MR. KOTCHEN: And so we have to increase that
23 further.

24 THE COURT: I see.

25 MR. KOTCHEN: Because here's what's going to happen.

1 Let's focus on class certification. They're going to say there
2 is no policy. There is no glue that binds the class together
3 pursuant to the Dukes case. And we're going to point to things
4 like utilization reports.

5 THE COURT: I got it.

6 MR. KOTCHEN: You track utilization --

7 THE COURT: Got it.

8 MR. KOTCHEN: You're under --

9 THE COURT: Got it.

10 MR. KOTCHEN: -- a mandate to increase utilization.

11 THE COURT: Okay.

12 MR. KOTCHEN: It's something separate from the raw
13 data.

14 THE COURT: Got it, all right.

15 MR. KOTCHEN: Yeah.

16 THE COURT: So the data is -- I appreciate Wipro's
17 position on relevance; we'll address that in a minute. The
18 data is now addressed. There are going to be data fields.

19 Why don't I hear from you on the relevance argument
20 more generally?

21 MS. WILLIAMS: Yeah. I mean, I think we've laid this
22 out pretty well in our briefs here. But courts in the Third
23 Circuit have routinely limited discovery regarding prior
24 allegations of discrimination to those involving the same type
25 of discrimination in this case. So in the Robbins case, for

1 example, which is a District of New Jersey case, the plaintiff
2 brought claims for race and age discrimination, but she sought
3 discovery regarding other acts of discrimination. And the
4 court there ultimately held that there was no relevance to
5 discrimination based on sex, religion, and other things.

6 And, therefore, limited the type of discovery to the
7 type of discrimination --

8 THE COURT: And --

9 MS. WILLIAMS: -- documents.

10 THE COURT: And I did exactly that on the last call,
11 right?

12 MS. WILLIAMS: Right.

13 THE COURT: I excluded from the --

14 MS. WILLIAMS: That's exactly what you did on age and
15 gender.

16 THE COURT: Correct.

17 MS. WILLIAMS: You said, no, there's no relevance to
18 that. This is an -- this is a race and national origin case,
19 you don't have to provide information regarding age and
20 gender --

21 THE COURT: Right.

22 MS. WILLIAMS: -- in the data. And so we think a
23 similar approach is warranted here.

24 And just to cite one other case, this is the
25 Ross-Tiggett case, another District of New Jersey case from

1 2019. And there, the court denied a motion to compel where the
2 request was not limited to, quote, "the type of discrimination
3 alleged" because, according to the court, "discovery requests
4 for prior acts of discrimination that contain no limitations as
5 to time, type of action complained of, or type of
6 discrimination alleged are overbroad and impose an undue
7 burden."

8 THE COURT: What do you do about what Phillips itself
9 did in Texas, right? Because the plaintiffs cite that Phillips
10 -- this -- I'm looking at Page 14, and they've cited a
11 transcript, but, "In regards to visa policies and practices, if
12 there are any documents relating to those visa policies and
13 practices, that would be included in what Wipro is required to
14 produce." What -- so I mean, you have essentially --

15 MS. WILLIAMS: We didn't -- we didn't produce --
16 they didn't -- the documents that they're seeking here with
17 respect to the reports and so forth related to visas, those
18 documents were not produced in the Phillips case, as I
19 understand it.

20 THE COURT: Okay.

21 MS. WILLIAMS: Anything else on relevance? But, I
22 mean, but the bottom line is, this is not a visa discrimination
23 case. It's a race and national origin case.

24 THE COURT: Yeah, I mean, I'll cut to the chase. I
25 disagree. I will reaffirm and reinforce what I said before on

1 the call on March 18th, that age and gender discrimination is
2 irrelevant to these issues here. And I appreciate that there
3 is not a direct visa discrimination claim at issue in this
4 case, but the plaintiffs are articulating a theory of the case
5 in which Wipro's visa practices and visa policies are proxies
6 for intentional race discrimination. And so the age and gender
7 cases and issues are distinguishable in my mind.

8 You know, I'm going to tell you, I find it -- I find
9 it very relevant if Wipro had a policy or has a practice of
10 directing all of its assets, all of its resources, all of its
11 energies towards securing visas for Indians and individuals of
12 South Asian nationality, to the exclusion of others -- of other
13 nationalities, that is relevant evidence. It tends to -- it
14 tends to, doesn't -- I'm not saying it does, but tends to prove
15 the plaintiffs' point. And so I do find those cases
16 distinguishable under the circumstances here.

17 I will say as a general matter, and I'll make this
18 finding, that visa practices are relevant to this case. And
19 Wipro is going to be directed to disclose to the plaintiffs,
20 certainly policies and procedures, directives, mandates that
21 relate to its visas and visa practices. RFP 8 is going to be
22 produced, to the extent those policies exist. And I'm sure
23 that there are policies directed towards visa practice
24 generally. I do find that relevant and discoverable.

25 Let me hear -- hear you, though, Ms. Williams, on --

1 with respect to RFP Number 16. Again, I believe that those
2 sorts of reports, to the extent that they exist, are going to
3 be relevant and discoverable. I don't know what exists though.
4 Mr. Kotchen outlined, you know, his belief that there's going
5 to be utilization reports and the like. I have no idea what
6 Wipro maintains.

7 MS. WILLIAMS: I may be mistaken, but I don't know
8 that we've discussed utilization reports with respect to visas
9 with Mr. Kotchen.

10 THE COURT: Yeah.

11 MS. WILLIAMS: Again, I may be mistaken --

12 THE COURT: Yeah.

13 MS. WILLIAMS: -- but I don't think we have. I mean,
14 certainly we've already agreed to produce a wide array of
15 documents -- and have produced a wide array of documents
16 responsive to 18, you know, reports concerning hiring, and
17 staffing, and benching, and appraisals, and promotions, and
18 terminations.

19 We have not agreed to produce any such reports
20 related to visas, nor do I believe we've ever discussed with
21 Mr. Kotchen these utilization reports --

22 THE COURT: Right. What I'm --

23 MS. WILLIAMS: -- he seems to be contemplating. And
24 I don't know, sitting here right now, what is out there in the
25 world.

1 THE COURT: Fair enough. And I didn't hear from Mr.
2 Kotchen anything definitive that these things actually do
3 exist, and you may or may not have had these discussions.

4 For present purposes, I am finding that any business
5 plans and regularly created reports with respect to Wipro's
6 visas generally are relevant and discoverable. But that is a
7 broad ruling and with the caveat that I don't know what sort of
8 reports Wipro maintains and runs. And so it's going to be on
9 counsel to meet and confer, and figure out -- Mr. Kotchen, I
10 think you have to articulate to Wipro exactly what sort of
11 reports and utilization data you're looking for, and understand
12 what Wipro actually maintains and keeps.

13 MR. KOTCHEN: Okay. Yes, Your Honor.

14 THE COURT: Okay; all right. Let me skip to -- Ms.
15 Williams, you can stay up here -- to RFP number 23. And this
16 may be a little bit of a gloss, but I understand the main
17 dispute to center around an already identified governmental
18 inquiry that was addressed by the court in Phillips. Is that
19 the only, to your knowledge, I'll use quotes, "investigation"
20 that would be responsive to RFP 23 as it relates to visas?

21 MS. WILLIAMS: I believe so, yes, Your Honor.

22 THE COURT: Okay. We pulled some information from
23 the docket in Phillips -- and please stop me if there's
24 anything that you don't feel comfortable addressing in open
25 court, but these were documents that were pulled publicly. My

1 understanding is that the inquiry was discontinued, and that is
2 the basis that the Court, in its minute order, denied the
3 request for Wipro to produce any responsive materials.

4 I want to stop there and leave it to you to discuss
5 what you're comfortable articulating in open court with respect
6 to that inquiry.

7 MS. WILLIAMS: May I have a moment, Your Honor --

8 THE COURT: Absolutely.

9 MS. WILLIAMS: -- to confer with my client.

10 THE COURT: Please.

11 (Pause)

12 MS. WILLIAMS: Your Honor, we're not comfortable
13 discussing this in open court.

14 THE COURT: All right, fair enough. Let me -- let me
15 then say broadly -- well, Mr. Kotchen, let me ask you this. Is
16 -- do you agree that this one identified inquiry is what's
17 really at issue with respect to RFP 23?

18 MR. KOTCHEN: I think that's the case. I mean, we
19 don't know, but I'll take Ms. Williams' word for it.

20 THE COURT: Okay. Let me say this. I appreciate
21 that the court in Phillips denied the request to compel Wipro
22 to produce materials related to that inquiry based on an in-
23 camera review of whatever was supplied to the court. I don't
24 know what that is. I don't know what the court reviewed. I
25 know what we pulled from the docket, and I know that the court

1 issued a minute order without explanation or reasoning, and
2 without making any, you know, off-the-cuff judgments about what
3 the court was thinking, I just don't know. And so I am
4 absolutely sympathetic to Wipro's position in light of what the
5 court in Phillips did, but I don't really know what the court
6 in Phillips did except from -- except for deny the request to
7 compel.

8 And what I would suggest, to deal with RFP 23, is you
9 go back and you confer with your client, re-review the notice
10 of filings for in-camera review. And if there is a limited set
11 of materials, even if it is exactly what you produced ex parte
12 and in-camera to the court in Phillips, I'm happy to take a
13 look at it myself. I think that's about as much as we can do
14 if you're not comfortable discussing in open court the status
15 of that inquiry.

16 I will say, Mr. Kotchen, I mean, based on what I
17 understand, and it is limited, you know, it's going to -- it's
18 going to be, I think, a tall order to convince me to do
19 something different than what the court in Phillips did. But I
20 think I owe it to the plaintiffs to at least take a look, all
21 right?

22 MS. WILLIAMS: Thank you, Your Honor.

23 THE COURT: All right. So let's say within two
24 weeks, you can supply to the Court -- and I'll leave it to your
25 judgment what to supply to the Court. Obviously, I'd prefer

1 not to look at 15,000 documents.

2 MS. WILLIAMS: Understood.

3 THE COURT: I don't -- if I'm looking at this
4 correctly, I don't anticipate that there will be a fulsome
5 universe of materials, but you can supply the Court whatever
6 you think is appropriate for the Court to make a judgment. And
7 if I have, you know, further questions or directions, I'll let
8 you know.

9 MS. WILLIAMS: Okay.

10 THE COURT: You can supply that ex parte to our
11 orders account two weeks from today, okay? File a public
12 notice that you've done that, all right? And I'll take a look,
13 and I'll issue a follow-up order.

14 MS. WILLIAMS: Okay.

15 THE COURT: Okay?

16 MS. WILLIAMS: Thank you, Your Honor.

17 THE COURT: All right. Anything else, Mr. Kotchen?

18 MR. KOTCHEN: No, Your Honor.

19 THE COURT: I don't think there's anything --

20 MR. KOTCHEN: I mean, if -- I'm -- I'm grateful that
21 you're going to look at it. If you reach the same conclusion
22 as the court in Texas, I understand.

23 THE COURT: All right. Mr. Kotchen, let me hear from
24 you then on Request 22.

25 MR. KOTCHEN: Request 22. Okay. Request 22 --

1 THE COURT: Let me understand exactly what you --
2 what you really want. And I'll say this with sort of a concern
3 that notwithstanding my finding of relevance, grievances,
4 complaints, internal investigations, litigation materials,
5 that's going to be highly over-inclusive.

6 MR. KOTCHEN: Okay.

7 THE COURT: And so I think, at a minimum, you need to
8 distill exactly what you're looking for.

9 MR. KOTCHEN: There's a -- they will -- Wipro has a
10 complaint process.

11 THE COURT: Yeah.

12 MR. KOTCHEN: So I think -- and as I understand it,
13 complaints are, to a large extent, centrally stored. And so I
14 think that there's a corpus of documents that should be
15 accessible. And the question is, what will they produce? And
16 so I think that they would -- they have already agreed to
17 produce -- if there's a complaint that, you know, I'm being
18 discriminated -- if someone's being discriminated against
19 because of a preference or a certain type of, you know, someone
20 of Indian descent or South Asian national origin, they have
21 agreed to produce that. What I was --

22 THE COURT: As to -- as to how to allocate that
23 employee to be staffed?

24 MR. KOTCHEN: Correct. If it -- like, for example,
25 you'll have complaints about people being put on the bench, and

1 they're not getting roles. They will -- you know, when you're
2 on the bench, it's a very uncomfortable place to be. And so
3 people -- it is, you know, where you're put a lot of times
4 before you're fired. And so there's a lot of complaints about
5 that.

6 There's complaints about, you know, "I'm not being
7 promoted and a preferred category of individual is." If you
8 look at the data, you will see that, you know, individuals of
9 Indian national origin are promoted at, you know, disparate
10 rates, greatly disparate rates. But I think that that's not a
11 dispute. I think that they're saying, "Yes, we'll produce
12 those."

13 I want to make sure if there are race complaints --
14 so for example, there will be complaints about someone saying I
15 have suffered some sort of consequence, or they're not
16 promoted, or I'm not being staffed or getting fired because
17 I'm African American or I'm Hispanic. Or that there's a
18 preference for visa employees. I want to make sure that
19 those --

20 THE COURT: Well, no, we're going to put the separate
21 race issue to the side.

22 MR. KOTCHEN: Okay.

23 THE COURT: I'm still focused on visas for the
24 (indiscernible - multiple speakers).

25 MR. KOTCHEN: Oh, for visas, I got it. Okay. If

1 there are complaints -- because there is a -- you know, people
2 that work at Wipro understand that when you're talking about
3 visa employees, what you're talking about is Indian nationals.
4 That is a -- that is a common understanding. And so if there's
5 a complaint saying, "I was displaced, and I had to train an
6 H-1B visa holder to take my job," that should be a complaint
7 that's produced. Because that's what happens, is that there
8 will be someone who receives a visa, is visa-ready, sitting in
9 India, they come over and take someone else's job, but that
10 person has to train them.

11 THE COURT: Let me ask, Ms. Williams, has Wipro
12 agreed, to the extent that there are internal complaints or
13 grievances as to preference for Indians or South Asians, you've
14 already agreed to produce that data.

15 MS. WILLIAMS: Yes, Your Honor. We've agreed to
16 produce complaints and internal grievances --

17 THE COURT: Right.

18 MS. WILLIAMS: -- alleging discrimination in favor of
19 South Asian and against individuals who are not South Asian --

20 THE COURT: All right.

21 MS. WILLIAMS: -- and not Indian.

22 THE COURT: As just a matter of common sense and
23 reality, I don't know what employee is going to specify their
24 complaint is because this worker had an H-1B visa as opposed to
25 -- but, you know, that might be a null set.

1 MR. KOTCHEN: Excuse me? That -- that --

2 THE COURT: That might be a null set, to the extent
3 you're asking Wipro to go in and identify additional
4 complaints, additional grievances that they haven't previously
5 agreed to produce --

6 MR. KOTCHEN: Right.

7 THE COURT: -- to the extent somebody's complaining
8 about visa discrimination.

9 MR. KOTCHEN: Correct. I mean, it is -- it is -- it
10 could be a null set, it could -- but there will be people who
11 are -- that have to train H-1B visa holders for jobs. And
12 there -- I mean, if -- you know, there very well may be
13 complaints about, "I had to train this H-1B visa employee. I'm
14 being displaced from a job. I'm losing -- you know, I'm going
15 to get fired." That is a complaint that wouldn't technically
16 say I'm being discriminated against because of my race or
17 national origin. But the effect of it is, look, they're
18 training to -- you know, they're these folks -- that everyone
19 knows H-1B visa employees are folks -- are Indian nationals.
20 We think that it should have to be produced.

21 And that's -- and as I understand it, that is a --
22 not within the scope of what they're willing to produce.

23 THE COURT: I think that's probably fair.

24 MR. KOTCHEN: Oh, yeah. So --

25 THE COURT: I'll hear from Ms. Williams in a second.

1 MR. KOTCHEN: And --

2 THE COURT: All right, thank you, Ms. Williams.

3 MR. KOTCHEN: Yeah --

4 THE COURT: All right. Anything else on the visa?

5 MR. KOTCHEN: On the complaints issue in general?

6 THE COURT: Yeah.

7 MR. KOTCHEN: I mean, look, if there's age, sex,
8 those are out, per your earlier order.

9 But if there are complaints about discrimination
10 against an African American based on race, or discrimination
11 against an Hispanic, because a lot of times the discrimination
12 is not "I'm being discriminated against because I'm a non-South
13 Asian," that's not how a lot of folks will express their -- the
14 type of discrimination at issue. You look at the data, you
15 know, African American employees will be terminated at very
16 high rates, almost certainly. Hispanics at very high rates,
17 almost certainly. They -- their complaints could sound in race
18 discrimination, but race discrimination against African
19 Americans, even though who they're displaced by, is, for
20 example, an Indian national.

21 And so we want to make sure that those are
22 encompassed with this --

23 THE COURT: I guess my concern, though, is I think
24 you need to tie it more directly to the theory of your case,
25 right? And I can imagine and envision a whole set, and I see

1 them every day, right, a -- what I'll refer to as a more
2 routine, typical employment discrimination type case, a hostile
3 work environment, right, alleging that somebody's supervisor
4 was hostile --

5 MR. KOTCHEN: Right.

6 THE COURT: -- towards them --

7 MR. KOTCHEN: Right.

8 THE COURT: -- because of their race. And that's not
9 really germane to what you're arguing here.

10 MR. KOTCHEN: Well, if there's a complaint, for
11 example, against -- by an African American, saying, "I'm an
12 African American, I was replaced by an Indian, or my Indian
13 supervisor is," that -- I think that tracks squarely with what
14 we're alleging in this case. And even though -- I mean, it's
15 literally form over substance to say, "I'm African American" --
16 I'm saying "I'm African American, I'm concerned about race
17 discrimination because my -- I'm being displaced in favor of an
18 Indian employee." It's no different than saying "I'm now a
19 South Asian being displaced by an Indian employee." And we
20 want to make sure that those complaints are captured in what's
21 produced.

22 THE COURT: One second.

23 (Pause)

24 THE COURT: All right. Thank you, Mr. Kotchen.

25 MR. KOTCHEN: Okay. Yes, Your Honor.

1 THE COURT: Ms. Williams?

2 MS. WILLIAMS: Thank you, Your Honor.

3 Just to be very clear about what we have agreed to
4 produce and not to produce, right? We've agreed to produce
5 documents regarding complaints and internal grievances where
6 the thrust of the complaint is discrimination in favor of South
7 Asian and against individuals who are not South Asian and not
8 Indian. So if there's a complaint, whether it's from a white
9 person, a Hispanic person, or what have you, that says, "I'm
10 being discriminated against in favor of an Indian person or a
11 South Asian person," we've agreed to produce those. Those are
12 fair game.

13 What we're trying to prevent -- and that's Mr.
14 Kotchen's whole theory of his case, of course. What we're
15 trying to prevent here is a fishing expedition into internal
16 complaints and grievances for, for example, the Hispanic
17 employee who says he's being, you know, discriminated against
18 in favor of the white person. Those issues are not germane to
19 this case at all. And so we are trying to confine it to what
20 is proportional to the needs of this case. And we believe that
21 the line we have drawn here is proportional, and that it's also
22 consistent with the case law. We've cited that case law at
23 Page 18 of our joint letter --

24 THE COURT: Just out of curiosity, Ms. Williams, I
25 mean, is the repository, and the complaint, and grievance

1 system, like, that granular where you can easily tell that
2 somebody's making the complaint that they're being
3 discriminated against in favor of an Indian or South Asian or
4 not?

5 MS. WILLIAMS: I mean, I think you have to go down
6 and do some digging. But, like, it's also -- they're not just
7 seeking internal complaints, right? They're seeking EEOC
8 charges.

9 THE COURT: Sure.

10 MS. WILLIAMS: They're seeking other types of
11 complaints and litigation materials. So, yes, there are the
12 eyesight sort of internal complaints where you have a general
13 sense of what's what. And I think we do have a pretty general
14 sense of what's what in terms of the type of discrimination
15 alleged and, you know, the race and national origin of the
16 players involved.

17 But, again, their request goes beyond just internal
18 complaints, and it goes much broader. And, of course, we're
19 talking about over a decade of time, and I know we'll get to
20 that. But it's really a lot of information, and they're asking
21 for all documents, you know, related to these complaints and
22 grievances.

23 THE COURT: All right. Yeah, I've thought a lot
24 about this. Mr. Kotchen, I take the point, but I do agree with
25 Wipro on proportionality grounds, provided that Wipro

1 understands, and based on our colloquy with Ms. Williams, I
2 think we're on the same page. I expect there to be a fulsome,
3 meaningful investigation, right, into the nature of --
4 particularly with respect to internal complaints and disputes
5 to understand exactly what is being alleged or complained
6 about. And if in substance the complaint is "I'm being
7 discriminated against" or "somebody else is given preferential
8 treatment because I'm not an Indian or South Asian," whether
9 phrased in those terms or not, those types of materials, I
10 believe, are relevant.

11 With that caveat, with that proviso, I do agree that
12 other forms of alleged race discrimination, while perhaps not
13 irrelevant as a practical matter or under the law, given the
14 scope of what's at issue here, the time period that we're
15 talking about on proportionality grounds, I am going to limit
16 the request for internal grievances and other complaints in
17 Request 22 to the type of discrimination that's alleged in this
18 case, okay.

19 MS. WILLIAMS: Thank you, Your Honor.

20 THE COURT: All right. All right, that brings us, I
21 believe, to -- C and D, we've covered. All right, the time
22 period. Mr. Kotchen?

23 MR. KOTCHEN: So, Your Honor, in preparing for this
24 hearing, I mean, it really -- I think the temporal period here
25 -- the temporal scope is something -- it relates completely to

1 the statute of limitations issue. And that is an issue that
2 Wipro and the Court addressed upon the motion to dismiss.

3 And so the American Pipe discussion, the Court
4 addressed that in its motion to dismiss order on Pages 25 -- on
5 Pages 27, and 28, and 29.

6 Wipro briefed China Agritech, the Blake decision in
7 its motion to dismiss. These are issues that the Court
8 decided, at least as to the individual claims at issue in this
9 case. And so we have, for example, two plaintiffs. One is Mr.
10 Valles, who was fired in January, 2015. And Mr. Gibbs, who
11 left, constructive discharge, we say, but left in September of
12 2015.

13 And so the issue is we have -- the Court addressed,
14 at least on the individual claims, kind of the statute of
15 limitations issue. If Wipro wants to re-argue the statute of
16 limitations as it pertains to the class, I think the
17 appropriate time to do that is at class certification. And
18 so --

19 THE COURT: I could not agree with you more.

20 MR. KOTCHEN: Okay.

21 THE COURT: And let me just say at the outset, I'm
22 not going to make any sort of judgment or ruling on the
23 applicability of American Pipe tolling, China Agritech --

24 MR. KOTCHEN: Okay.

25 THE COURT: -- in -- for today's purposes.

1 MR. KOTCHEN: Okay.

2 THE COURT: All right? That's not to say I'm ruling
3 in your favor.

4 MR. KOTCHEN: I understand.

5 THE COURT: But I'm not making --

6 MR. KOTCHEN: Okay.

7 THE COURT: -- any sort of legal pronouncements for
8 discovery purposes that's going to put everybody in an awkward
9 position before the District Judge when and if that issue gets
10 teed up.

11 MR. KOTCHEN: Understood. And so then what that
12 leaves is a dispute about whether the temporal period should be
13 January, 2013 forward or March, 2015 forward.

14 THE COURT: Say that one more time. What dates are
15 you working with?

16 MR. KOTCHEN: Our date -- our preferred date is
17 January 1st, 2013.

18 THE COURT: All right.

19 MR. KOTCHEN: Wipro, what they are -- have agreed to
20 is March 30th, 2015. And look, I mean, the question -- I mean,
21 the reason why we chose the 2013 date is because we filed --
22 and I know we're getting into American Pipe -- things that
23 we're not -- that we're not going to decide today. But we
24 filed the Phillips case in 2017, so that was the logic to going
25 back to 2013. And if class claims do -- if it is appropriate -

1 - if American Pipe does -- does apply at the class
2 certification stage, we think it's totally appropriate to go
3 back to 2013. Separate and apart from that, even if you're
4 talking about individual claims of Valles and Gibbs, you're
5 going to need discovery prior to 2015 to show, for example,
6 termination patterns, you know, failure to promote, and so --
7 and those types of things.

8 THE COURT: When were they -- they were terminated
9 when?

10 MR. KOTCHEN: So Gibbs left September 15th of 2015.
11 Valles, January 31st of 2015. So it puts -- you know, by
12 choosing the March, 2015 beginning points of discovery, as
13 Wipro has -- suggests or argues here, it puts those claims,
14 even as to those individuals, setting aside the class issues,
15 and very -- it is very difficult for us to show what happened
16 leading up to 2015 on the discovery. That is --

17 THE COURT: As to those individuals.

18 MR. KOTCHEN: As to those individuals. And, again,
19 we would -- I think there is a good logic that even if we're
20 limited on statute of limitations further than, you know, if
21 the -- if Judge Cantor [sic] doesn't agree that it goes back to
22 2013, and we think that she should, but if she doesn't, we
23 still want to show a pattern or practice over time to show
24 commonality, to show that there's a known -- a known
25 discriminatory intent, in effect, of the policies and practices

1 at issue.

2 THE COURT: You don't dispute, do you, that the
3 Phillips data set will cover materials in some sense --

4 MR. KOTCHEN: Yes.

5 THE COURT: -- going back to 2013?

6 MR. KOTCHEN: Correct, I -- I --

7 THE COURT: So you're going to get some, right?

8 MR. KOTCHEN: We're getting some, yes. I agree with
9 that.

10 THE COURT: Okay.

11 MR. KOTCHEN: And we think that, you know, 2014 is
12 important because Wipro dropped its affirmative action program
13 then because its business, you know, its business practices and
14 kind of its business, you know, policies didn't lend itself to
15 show compliance with affirmative action. I mean, those --

16 THE COURT: Listen, I'm going to tell both of you,
17 and I'll hear from you why I shouldn't do this, but it is now
18 June 4th, 2014 [sic] --

19 MR. KOTCHEN: Yes.

20 THE COURT: -- right? A clean even proportional
21 proposal that the Court has is June 1, 2014. That's 10 years
22 ago. From your perspective, is there a problem with that?

23 MR. KOTCHEN: Judge, we're -- we -- I, again, in
24 preparing for this, I figured that's where you were going to
25 go. I think that's the right approach.

1 THE COURT: All right; thank you.

2 MR. KOTCHEN: Okay.

3 THE COURT: Ms. Williams?

4 MS. WILLIAMS: Your Honor, I don't think I need to
5 waste too much more of our time if we're not getting into China
6 Agritech and American Pipe tolling because that's the whole
7 basis of our position for why we think discovery should just go
8 back to 2015. And, you know, all I was just going to say is
9 that as is cited in our papers, discovery going back more than
10 a decade is routinely found to be unduly burdensome. So, I
11 think the Court's approach makes good sense.

12 THE COURT: Yeah, that's exactly what I'm going to
13 do. I'm absolutely sensitive to the burdens, particularly in
14 light of, you know, the issues that I anticipate you all will
15 be having with respect to lost and destroyed ESI generally, and
16 those are going to be more and more of a problem the farther
17 and farther back you go, number one. Combined with the fact
18 that the plaintiffs will be getting, in some sense, I don't
19 know how much, but at least to Mr. Kotchen's candid admissions,
20 which I appreciate, will cover the 2013/2014 time period; I'm
21 going to cut it off at 10 years. And so the time period that
22 we're going to use, aside from the Phillips data that has
23 already been reproduced, and that is what it is, is June 1,
24 2014, okay?

25 MS. WILLIAMS: Thank you, Your Honor.

1 THE COURT: All right. Payroll data, Subcategory F.

2|| Mr. Kotchen?

3 MR. KOTCHEN: Judge, the issue here is -- is pretty
4 simple. The -- the visa program at issue is the H-1B visa
5 program. And there, the visa -- there are certain wage
6 requirements for H-1B employees. They have to be paid, for
7 example, at least as much as American counterparts. The visa
8 issues to the --

9 THE COURT: Mr. Kotchen, one second.

10 || (Pause)

11 THE COURT: All right. Thank you, Mr. Kotchen.

12 MR. KOTCHEN: Yes. You want -- should I proceed?

13 THE COURT: Yeah, go ahead.

14 MR. KOTCHEN: Okay. So the -- on the H-1B visa
15 program, the visa issues to the employee. And so that gives a
16 corporation like Wipro extraordinary power because if that
17 employee has any complaints about Wipro, and Wipro terminates
18 the employee, that person is going to be deported except in the
19 unlikely circumstance of someone who immediately decides to --

20 THE COURT: Gets married or --

21 MR. KOTCHEN: Yeah. So what we -- what we think we
22 will see in discovery is that H-1B employees are going to be
23 treated very poorly by Wipro.

24 THE COURT: Poorly.

25 MR. KOTCHEN: Poorly.

1 THE COURT: Okay.

2 MR. KOTCHEN: Yes. They are -- they're indentured to
3 the corporation. Their visa is tethered to the corporation.
4 And we think, among other things, that they're going to be
5 underpaid relative --

6 THE COURT: Isn't that contradictory to what your
7 theory is, though?

8 MR. KOTCHEN: No, it's -- it's one of the reasons why
9 there's a preference.

10 THE COURT: Oh, I see.

11 MR. KOTCHEN: There's a --

12 THE COURT: I see. I see.

13 MR. KOTCHEN: There's a cultural preference for --
14 for -- because the employee will come, they will accept it.
15 They -- basically the workplace norms that apply --

16 THE COURT: I see.

17 MR. KOTCHEN: -- in India are going to be applied
18 here. We think it's perfectly consistent with it.

19 And so the payroll data we think will show
20 underpayment of H-1B employees. And we think that that goes to
21 the issue of indenture.

22 THE COURT: Underpayment relative to non-H-1Bs?
23 Underpayment in a broad sense? What do you mean?

24 MR. KOTCHEN: Relative to their non-Indian
25 counterparts. So they are supposed to be paid at least as much

1 as other folks in similar geographies and similar experience.
2 We don't think that's happened -- that that happens. That's
3 the relevance of it.

4 THE COURT: What sort of universe of -- how many
5 employees are we talking about here over a 10-year period? I
6 mean, it could be --

7 MR. KOTCHEN: It's going to be a lot.

8 THE COURT: -- hundreds of thousands of employees?

9 MR. KOTCHEN: Not a hundred --

10 THE COURT: Ten --

11 MR. KOTCHEN: Not hundreds of thousands, but it'll --

12 THE COURT: Fifty thousand employees?

13 MR. KOTCHEN: Order of magnitude, I'm just guessing,
14 fifty to 60,000. I mean, it's going to be not a trivial
15 amount --

16 THE COURT: Okay.

17 MR. KOTCHEN: -- which we understand.

18 THE COURT: Is there -- and you -- as you sit here,
19 you don't have any reason to dispute that this data is going to
20 be with ADP or --

21 MR. KOTCHEN: I don't --

22 THE COURT: -- a payroll --

23 MR. KOTCHEN: Yeah, I don't have any reason doubt --
24 to dispute that.

25 THE COURT: Okay; all right.

1 Ms. Williams, is this -- you're not making a
2 relevance argument. This is a burden argument, is that
3 correct?

4 MS. WILLIAMS: Well, I'm going to focus on the
5 burden --

6 THE COURT: Okay.

7 MS. WILLIAMS: -- the burden argument. I mean, we
8 think this obviously is not a, you know, pay discrimination
9 case, or anything like that. We -- and I will address a couple
10 of his comments on relevance in a minute.

11 But I want to just start with burden here. You know,
12 we appreciate the Court's time, and the way that we went into
13 detail in explaining, and thinking through, and engaging with
14 us on the burden of producing the staffing data. This is a
15 very similar problem and situation, Your Honor. Collecting the
16 payroll data for tens of thousands of employees going back ten
17 years who worked in the U.S. would be unduly burdensome and
18 disproportional to the needs of the case.

19 THE COURT: Do you happen to know the answer to my
20 question? I mean, how many -- how many employees, roughly,
21 we're talking about over ten years?

22 MS. WILLIAMS: Tens of thousands, I believe.

23 THE COURT: Okay.

24 MS. WILLIAMS: I don't -- I don't have a --

25 THE COURT: Yeah, I'm just -- I'm just curious. I'm

1 not --

2 MS. WILLIAMS: I don't have a better number, sitting
3 right here.

4 THE COURT: Fair enough.

5 MS. WILLIAMS: So the payroll data for U.S.
6 employees is primarily stored on ADP systems. And pulling the
7 data would require input from a variety of teams at Wipro:
8 payroll, IT, legal, data privacy, as well as ADP, who would
9 likely require --

10 THE COURT: Help me understand that, though. Why is
11 that? Why would it take so many different teams if you just
12 could go to ADP?

13 MS. WILLIAMS: You can't just go to ADP. We need
14 input from all these different people. They've used multiple -
15 - there's -- this is not just a simple push of the button at
16 ADP, and we'd have to go through a bunch of these different
17 departments to understand what's available, who's in play. And
18 internally, there is not some simple report that just has
19 everybody's salary. It's -- there's not a report -- just like
20 in the staffing data case, right? That he wanted a certain
21 type of staffing data. We said that's just not how we store
22 the data, and here's all the extra hoops we would have to -- to
23 go through to get the data in the requested form. It's an
24 analogous situation here, Your Honor.

25 And then preparing the data for production would be

1 another issue, and hurdle, and burden, right? The payroll
2 information has a lot of PII. There would be a lot of -- you
3 know, things like Social Security numbers would need to be
4 redacted and, you know, courts have recognized, as we cited in
5 our brief, that this is another -- you know, where significant
6 redactions would need to be made, this also is -- can --

7 THE COURT: But that's sort of a self-imposed burden,
8 right? I mean you have a confidentiality order, right?

9 MS. WILLIAMS: Right, we have a --

10 THE COURT: There's a discovery confidentiality
11 order, right?

12 MS. WILLIAMS: Sure. But we'd still have to
13 imply [sic] redactions, and courts have -- recognizing that
14 having to apply significant redactions, you know, can counsel
15 against production of --

16 THE COURT: But what I'm saying is you could produce
17 the data without redacting Social Security numbers pursuant to
18 the provision of the discovery confidentiality order, right?
19 Whether you elect to do so, right, is a burden of your own
20 choosing, is that correct?

21 MS. WILLIAMS: I see, Your Honor; yes.

22 THE COURT: Yeah, okay.

23 MS. WILLIAMS: Yes. Regarding the need for this
24 data, we think those arguments are unavailing. You know, one
25 of the arguments that they're making here effectively is that

1 inequitable pay shows their -- shows Wipro's propensity to
2 violate the discrimination laws. And evidence regarding our
3 propensity to discriminate is plainly -- it's not what
4 discovery is used for, and it's not a proper basis on which to
5 seek discovery. And we think this is just an overreach, and
6 the burden here is just -- the juice is not worth the squeeze,
7 so to speak.

8 THE COURT: Got it. Thank you, Ms. Williams.

9 Mr. Kotchen, I have a couple questions.

10 MR. KOTCHEN: Yes, Your Honor.

11 THE COURT: Does this -- these requests go to class
12 certification? They go to merits? They go get both? What?

13 MR. KOTCHEN: They do not go to class certification.
14 They go to merits.

15 THE COURT: Okay. And what do you ultimately intend
16 to do? I assume, just to your prior discussion, you intend to
17 take payroll data with respect to Indians compared to non-
18 Indians at the same time, right? Trying to do an apples-to-
19 apples comparison, and then say, look, this is evidence that --
20 of, you know, the discrimination?

21 MR. KOTCHEN: Yeah. This is -- this is evidence
22 showing the cultural preference. The reason -- one of the
23 reasons why that they -- there is a, you know, a preference
24 for this type of employee, and this type of employee happens
25 not to be mistreated under, you know, any normal circumstance.

1 So --

2 THE COURT: All right. Here's what I think we should
3 do. I do find that this sort of information would be relevant
4 to the plaintiffs' claims, but I am absolutely sensitive to the
5 burden that's going to be imposed on Wipro, both with respect
6 to the number of employees generally, the time period. I take
7 Ms. Williams at her word when she says it's going to require a
8 number of different groups, even to get the information.

9 MR. KOTCHEN: Okay.

10 THE COURT: I'm not particularly persuaded by the
11 burden in redacting information, but I am sensitive to the
12 overall burden. And so I'm not going to require Wipro to do
13 this for every employee over a 10-year period. I think what
14 counsel should do is meet and confer on an appropriate limited
15 sample set.

16 MR. KOTCHEN: Yes, Your Honor.

17 THE COURT: And we'll start there.

18 MR. KOTCHEN: Very good.

19 THE COURT: Beyond that, I'm not going to give any
20 sort of parameters in terms of numbers or time. But I'm
21 telling you, I'm sensitive to the burden.

22 MR. KOTCHEN: Understood.

23 THE COURT: And the meet and confer should absolutely
24 be tailored to that. You know, I'll leave it there, okay?

25 MR. KOTCHEN: Okay.

1 THE COURT: Okay?

2 MR. KOTCHEN: Understood, Judge.

3 THE COURT: Fair enough, Ms. Williams?

4 MS. WILLIAMS: Yes. Thank you, Your Honor.

5 THE COURT: All right. I think that takes care of
6 all of the disputes with respect to the plaintiffs' requests.

7 MR. KOTCHEN: Yes, Your Honor, I think that's right.

8 THE COURT: All right. Category G, I think -- I
9 think that's the only dispute remaining for defendant's
10 requests, correct? With respect to the interrogatories to the
11 named plaintiffs.

12 MS. WILLIAMS: Yes.

13 THE COURT: Okay. Ms. Williams, let me hear from
14 you.

15 MS. WILLIAMS: So the last issue, Your Honor, is --
16 just involves whether that the named plaintiffs should have to
17 produce employment applications that they made for jobs outside
18 of Wipro while they were employed by Wipro. They've agreed to
19 produce employment applications after they left Wipro, but
20 they're not agreeing to produce the ones that they -- that they
21 may have submitted while employed. Just to put that they --

22 THE COURT: Can I just ask just a very basic
23 question? I mean, these are interrogatories. So you've asked
24 for information, right? Is there an associated RFP?

25 MS. WILLIAMS: Yeah, there's an associated RFP, as

1 well.

2 THE COURT: Okay. Okay.

3 MS. WILLIAMS: But the -- yes, but --

4 THE COURT: Fine.

5 MS. WILLIAMS: -- the main one here that we're
6 seeking is -- they have -- they have answered the interrogatory
7 and produced documents with respect to --

8 THE COURT: The post employment.

9 MS. WILLIAMS: -- post employment, but are refusing
10 to do so for ones submitted during their employment.

11 THE COURT: Yeah, no, I got -- I got that
12 distinction. I just wanted to make sure. I mean, you're not
13 just seeking answers to interrogatories. You want associated
14 documents. The documents themselves.

15 MS. WILLIAMS: Yes.

16 THE COURT: Okay. Okay.

17 MS. WILLIAMS: So, I mean, just to -- you know, we
18 hear a burden argument from them and we hear a relevance
19 argument. I mean, just to put the burden argument in context
20 here, we're talking about five individuals going back 10 years
21 and a couple of presumably -- potentially a few relevant
22 employment applications going off, you know, over -- over a
23 couple -- a few year period here. You know, they may say they
24 can't find them, or whatever the case may be. But just to put
25 the burden that we're dealing with for these five named

1 plaintiffs over, you know, a set period of time versus the
2 burden that we're dealing with for, you know, producing data
3 for, you know, a gazillion employees, it just seems like
4 there's a different set of rules. And, you know, I just wanted
5 to put that in context.

6 THE COURT: You don't have a problem with the June 1,
7 2014 time limitation, do you?

8 MS. WILLIAMS: No. No, we're good. We said -- we
9 agreed to that. We think that's -- that's reasonable. But,
10 you know, plaintiffs have refused, saying that these
11 applications don't concern the core issues in the case. That's
12 not the standard for discovery, Your Honor. You know,
13 discovery regarding any non-privileged matter that may be
14 relevant to any party's claim or defenses is fair game under
15 the Federal Rules. And information regarding the applications
16 that the named plaintiffs submitted during their employment at
17 Wipro is relevant for a number of reasons, right? It could
18 contain information about plaintiffs' employment at Wipro,
19 their duties, their responsibilities, the promotions received,
20 as well as their reasons their employment ended. The way they
21 characterize those subjects may be different than the way
22 they're now characterizing them in the complaint. They may be
23 helpful to Wipro's defenses, or not. But we're entitled to
24 test that, and we're entitled to discovery on those issues.
25 They like --

1 THE COURT: You know what, that -- let me -- a
2 practical question. You don't doubt, do you, that these five
3 individuals may not have perfectly clear memories as to every
4 position they may or may not have applied for? I can't imagine
5 what my records going back 10 years look like. I mean, those
6 are just sort of practical problems you may run into.

7 MS. WILLIAMS: Of course.

8 THE COURT: And if the answer is, "To the best of our
9 knowledge and recollection, and to the best that a reasonable,
10 diligent search can uncover, this is what we got," right?

11 MS. WILLIAMS: Of course, Your Honor. Of course.
12 And I think I was alluding to that -- to that before. They may
13 say they don't remember, but we're asking for them to, you
14 know, conduct a reasonably diligent search. You know, for
15 example, search their email box. You know, did they apply
16 through something through LinkedIn? Did they use Indeed? Do
17 they happen to remember, you know, someone they reached out to
18 about potential employment? You know, I don't know what more
19 we can really ask for here, but we think that's reasonable and
20 well, you know, within the bounds of the case here. And --

21 THE COURT: And only the named plaintiffs.

22 MS. WILLIAMS: Yes, only for the named plaintiffs,
23 Your Honor.

24 THE COURT: All right.

25 MS. WILLIAMS: This is really a pretty narrow, you

1 know, body of information we're seeking here. You know, we've
2 noted in our -- in our letter brief that other courts have
3 ordered this information produced, and we think this is a
4 pretty narrow and reasonable request.

5 THE COURT: Got it.

6 Mr. Kotchen?

7 MR. KOTCHEN: Judge, we'll agree.

8 THE COURT: Thank you.

9 MR. KOTCHEN: Yes, I -- I can read the tea leaves.

10 THE COURT: I appreciate it.

11 MR. KOTCHEN: Okay.

12 THE COURT: Listen, I mean, it is what it is.

13 MR. KOTCHEN: Yeah.

14 THE COURT: If your clients, you know -- they are
15 expected to conduct --

16 MR. KOTCHEN: Okay.

17 THE COURT: -- a reasonable -- reasonable, diligent
18 investigation, right?

19 MR. KOTCHEN: Yeah.

20 THE COURT: Not a cursory one.

21 MR. KOTCHEN: Okay.

22 THE COURT: They are required to rack their brains --

23 MR. KOTCHEN: Okay.

24 THE COURT: -- and respond.

25 MR. KOTCHEN: Okay.

1 THE COURT: I think these --

2 MR. KOTCHEN: Understood.

3 THE COURT: -- interrogatories are perfectly
4 reasonable.

5 MR. KOTCHEN: Thank you, Judge.

6 THE COURT: All right. I think that takes care of
7 everything, is that correct?

8 MS. WILLIAMS: Your Honor, I have just two other
9 quick --

10 THE COURT: Sure.

11 MS. WILLIAMS: -- quick issues I wanted to just close
12 the loop on.

13 THE COURT: Please.

14 MS. WILLIAMS: Unfortunately, it relates back to the
15 backups -- backups issues. My colleague, Alex, here just told
16 me earlier that you had asked sort of -- you gave a
17 hypothetical about, okay, well Employee X, you know, left in
18 2015 or --

19 THE COURT: Yeah.

20 MS. WILLIAMS: -- you know, whatever year, and he's
21 not on a litigation hold, and what information is available
22 with respect to email specifically, because I think we've given
23 you the answer that you were looking for with respect to the
24 share drives and so forth. So my understanding is, is that
25 email would be deleted after 30 days after that employee leaves

1 if no litigation hold is in place.

2 THE COURT: And if that employee didn't create a PST,
3 etc.

4 MS. WILLIAMS: Correct, if that employee didn't --
5 didn't create a PST.

6 THE COURT: All right. I mean, that's sort of an
7 off-the-cuff in court representation to the sorts of things
8 that we were talking about. And I expect that as you get into
9 the individual meet and confers or -- the meet and confers on
10 individual custodians, if that sort of is the overall answer to
11 the email question, that's what Mr. Kotchen was looking for, so
12 I appreciate that. But thank you for clarifying it with me.

13 MS. WILLIAMS: Sure. And just one other thing on a -
14 - on a slightly related topic. With respect to the lost and
15 destroyed ESI, we had taken issue with one of the RFP
16 instructions.

17 THE COURT: Oh, right, yeah.

18 MS. WILLIAMS: And I don't think we quite closed the
19 loop on that.

20 THE COURT: Yeah, let me -- this was one of the
21 category I didn't really understand there to be a whole lot of
22 delta between the parties, so maybe you can help me, right?
23 They cite the -- you know, the K-Dur case, and that's the
24 standard that you want to employ?

25 MS. WILLIAMS: That is, but they won't agree to that.

1 THE COURT: Okay. Mr. Kotchen, with respect to that
2 instruction, what exactly are you looking for?

3 MR. KOTCHEN: I mean, what we're looking for, if
4 there's -- if there is information that has been lost or
5 destroyed and that's requested in -- I guess, in this situation
6 that they've agreed to produce. I mean, this is something --

7 THE COURT: Right, yeah.

8 MR. KOTCHEN: -- that's been -- and I think that that
9 is an important caveat that dovetails with where we were
10 earlier today, then they should have to identify that, and kind
11 of the circumstances. That -- that's it. Not --

12 THE COURT: I don't understand them to be saying
13 anything different. Are you, Ms. Williams? That's what I --
14 that's why I'm -- I was totally befuddled by the dispute here.

15 MS. WILLIAMS: I can pull up the request, but the
16 request goes much broader than just explaining the
17 circumstances of why a document is lost or destroyed. We don't
18 have issue with that in terms of the -- relying on what was set
19 forth in the case that plaintiff cited --

20 THE COURT: Yeah, listen, Mr. Kotchen, let me just
21 say, hopefully we can just cut to the chase. We're not going
22 to go to, like, super mini investigations --

23 MR. KOTCHEN: No.

24 THE COURT: -- and scorch the earth, right? I think
25 it's incumbent on Wipro to explain reasonably in good faith the

1 circumstances in which documents or ESI is lost or destroyed.
2 But we're not going to have an inquest with every document
3 that's lost or destroyed.

4 MR. KOTCHEN: That's fair enough, Judge. I think --
5 I think that the parties can work this out.

6 THE COURT: I certainly hope so.

7 MR. KOTCHEN: Yeah.

8 MS. WILLIAMS: Okay; thank you.

9 THE COURT: All right. But, I mean, just to be
10 clear, right, I see both sides are citing the K-Dur case, and
11 we will use that as the governing standard. You need to
12 explain in good faith reasonably why data is lost or destroyed.

13 MS. WILLIAMS: Right.

14 THE COURT: And we're going to leave that sort of as
15 the directive with the understanding of what I just said.
16 We're not, like, you know, doing full-blown mini litigations
17 every time a document has been lost.

18 MS. WILLIAMS: Got it. And I totally understand
19 that, and that makes sense. But the request --

20 THE COURT: I got it.

21 MS. WILLIAMS: The instruction, as written, went far
22 beyond that and a multi pronged --

23 THE COURT: Got it.

24 MS. WILLIAMS: -- approach of information that we
25 needed to provide, which we think goes well beyond this K-Dur

1 case that is cited in their papers.

2 THE COURT: Got it.

3 MS. WILLIAMS: So I hear you, and we will go with
4 what the standard that was -- and the instruction in the --

5 THE COURT: Yeah.

6 MS. WILLIAMS: -- K-Dur case that plaintiffs cited in
7 their papers.

8 THE COURT: Excellent.

9 MS. WILLIAMS: Okay; thank you.

10 THE COURT: All right. Now, I think we're complete.

11 MR. KOTCHEN: I think so.

12 THE COURT: Mr. Kotchen?

13 MR. KOTCHEN: I think so, Judge. We --

14 THE COURT: Is there anything else that you needed to
15 address today?

16 MR. KOTCHEN: No, Your Honor.

17 THE COURT: All right.

18 MR. KOTCHEN: We appreciate it.

19 THE COURT: Ms. Williams?

20 MS. WILLIAMS: No, that's it; thank you.

21 THE COURT: All right. I appreciate counsel's
22 thought and care into laying out these issues. I think we have
23 a working plan. We will do our best to embody all of this in a
24 short and succinct written order. For, I think, clarity's
25 sake, what we may do is email a draft copy of the order out to

1 counsel just to make sure that there's no confusion. It's not
2 my typical practice, but I want to make sure that everybody is
3 on the same page. I may do that. I want to give that some
4 thought.

5 In terms of next steps, the Phillips data is under
6 review --

7 MR. KOTCHEN: Yes, Your Honor.

8 THE COURT: -- yes, Mr. Kotchen?

9 MR. KOTCHEN: Yes, Your Honor.

10 THE COURT: To the extent that there are any
11 lingering or disputes that arise out of that data, you're going
12 to meet and confer, and you'll be back, and I will not hold my
13 breath --

14 MR. KOTCHEN: Okay.

15 THE COURT: -- but hopefully you can work out --

16 MR. KOTCHEN: All right.

17 THE COURT: -- whatever disputes you have.

18 From your perspective, where are we -- where do we go
19 from here?

20 MR. KOTCHEN: Judge, you know what's -- I just -- why
21 (indiscernible) -- I don't -- what does the -- the schedule --
22 I do not have a schedule before me.

23 THE COURT: Yeah, I don't -- I don't either.

24 MR. KOTCHEN: That is -- I mean, I think that --

25 THE COURT: Put aside timing for a minute.

1 MR. KOTCHEN: Okay.

2 THE COURT: I'm less concerned with timing.

3 MR. KOTCHEN: Okay.

4 THE COURT: But just sort of process where we are.

5 MR. KOTCHEN: So I think what I -- from my
6 perspective, I think that both sides have their homework. That
7 we should start conferring in short order on probably
8 custodians and so forth. And I think that your judge has given
9 us plenty of guidance on both your rulings and where you're
10 going to go with issues, that we can work on custodians, and
11 then what's going to be searched. I think that -- that is the
12 next -- as a practical matter, that's the next step for us.

13 THE COURT: Okay. Agreed, Ms. Williams?

14 MS. WILLIAMS: Yes, I agree, Your Honor. That does
15 make sense. But I -- just -- just to quickly address the
16 schedule. I think we -- discovery was supposed to be complete
17 last month, so you have temporarily stayed all deadlines --

18 MR. KOTCHEN: Yeah, right.

19 MS. WILLIAMS: -- in the case.

20 THE COURT: Right, that's correct.

21 MS. WILLIAMS: Just to refresh everyone.

22 MR. KOTCHEN: Correct.

23 THE COURT: That's correct.

24 MS. WILLIAMS: So --

25 THE COURT: All right.

1 MS. WILLIAMS: -- that's where we are in terms of the
2 -- of -- of the schedule.

3 MR. KOTCHEN: Okay.

4 THE COURT: How much -- just best estimates as we sit
5 here today, I'm not holding anything -- anybody to anything --
6 to negotiate custodians to get relevant requests out with
7 respect to custodians, I mean, how -- are we talking about 60
8 days? Thirty days? Forty-five days? I'm -- give me a sense
9 what you think that's going to look like.

10 MR. KOTCHEN: So what I think -- I mean, 60 days was
11 what I thought. But there's two things that need to happen:
12 One is the custodians themselves, and that -- that's one issue.
13 But then there's kind of search terms and so forth --

14 THE COURT: Right.

15 MR. KOTCHEN: -- that -- that were also -- and that
16 is going to -- that's a more time-consuming endeavor because I
17 think that it's going to require search hits and so forth.

18 MS. WILLIAMS: Yeah.

19 MR. KOTCHEN: That what I would recommend is that
20 we -- 60 days sounds like a reasonable time frame for us to,
21 like, work those issues out. I understand that the search term
22 is going to -- is going to be the more time-consuming aspect of
23 that. So perhaps it -- hopefully we can reach an agreement
24 within 60 days, or perhaps report back to you within 60 days.

25 THE COURT: On the custodians or on the --

1 MR. KOTCHEN: On both, custodians and then search
2 terms.

3 THE COURT: You don't have a problem -- I don't see -
4 - that was my next question. There's no reason why you can't
5 also be working on search terms generally --

6 MR. KOTCHEN: We -- we --

7 THE COURT: -- starting now, right?

8 MR. KOTCHEN: We can start that process.

9 THE COURT: You can start the process, right?

10 MR. KOTCHEN: Yeah.

11 THE COURT: Okay.

12 MR. KOTCHEN: The custodian issue, I think -- I think
13 we can start the search term process.

14 THE COURT: Why don't we just do this? I think 60
15 days is --

16 MR. KOTCHEN: Okay.

17 THE COURT: -- a reasonable estimate. I appreciate
18 that the search terms may be a more developed conversation.

19 MR. KOTCHEN: Okay, right.

20 THE COURT: Why don't we -- with the understanding
21 that you're going to get into, and hopefully agree on, a
22 custodian list, make progress on the search terms discussion.

23 MR. KOTCHEN: Okay.

24 THE COURT: We'll have a call in about 90 days.

25 MR. KOTCHEN: Okay.

1 THE COURT: All right? I'll ask you in advance of
2 that call to meet and confer, submit a joint status letter, a
3 short one, not a dispute letter --

4 MR. KOTCHEN: Yes.

5 THE COURT: -- proposing a -- letting me know where
6 we are with everything, and proposing a schedule going forward
7 from that 90-day period. We'll get on the phone and we'll sort
8 it out.

9 MR. KOTCHEN: Perfect. That sounds good, Judge.

10 THE COURT: Okay? So for now, all discovery
11 deadlines will remain stayed.

12 MR. KOTCHEN: Okay.

13 THE COURT: But my -- our order will outline the date
14 for a call and a status letter -- a status report in advance.

15 MR. KOTCHEN: Okay.

16 THE COURT: Fair enough?

17 MS. WILLIAMS: Yes.

18 MR. KOTCHEN: Thank you very much.

19 MS. WILLIAMS: Thank you, Your Honor.

20 THE COURT: All right. Thank you, Counsel. Mr.
21 Kotchen, I hope your back is still intact.

22 MR. KOTCHEN: I appreciate it. I'll give you an
23 update in 90 days about --

24 (Laughter)

25 THE COURT: Counsel, sir, it was nice to meet you.

1 MR. KOTCHEN: Okay.

2 THE COURT: Thank you for being here. Save travels,
3 everyone. We're adjourned.

4 MR. KOTCHEN: Thank you very much.

5 COURTROOM DEPUTY: All rise.

6 (Whereupon, at 1:05 p.m., the hearing was adjourned.)

7

8 CERTIFICATE OF TRANSCRIBER

9

10 I, KAREN HARTMANN, a certified Electronic Court
11 Transcriber, certify that the foregoing is a correct transcript
12 from the electronic sound recording of the proceedings in the
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